Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1999

MARY JEWELL

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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A public school teacher with a property interest in her employment is denied due process of law when she is terminated without post-termination notice and opportunity to be heard by the school board trustees as the final decisionmaker?

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit decided an Important Federal Question in a manner which is in conflict with prior decisions of this Court concerning the due process rights of public school teachers who possess a property right in continued employment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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NO.

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DALLAS INDEPENDENT SCHOOL DISTRICT

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To The United States Court of Appeals For
The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mary Jewell, respectfully petitions for a writ of certiorari to review judgment of the United States Court of Appeal for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced in the Appendix filed herewith ("App.") at 1a.

The opinion of the district court is unpublished and is reproduced in the App. at 4a.

RELEVANT DISD DECISIONS

The September 29, 1995 Level III decision of the Hearing Examiner relating to Jewell's appeal of the 1993-94 & 1994-95 appraisals is reproduced in the App. at 9a.

The April 25, 1996 decision of the DISD Board of Trustees overruling the Level III decision on Jewell's appraisal grievances is reproduced in the App. at 14a.

STATEMENT OF JURISDICTION

The United States Court of Appeals decided this case on July 14, 1999. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C § 1983.

STATEMENT OF THE CASE

Mary Jewell ("Jewell") received undergraduate degrees in 1971 and 1976, and a Masters Degree in Secondary Education from the University of Oklahoma in 1977. Jewell was hired by Dallas Independent School District ("DISD") as a Special Education Resource Teacher at Adamson High School beginning with the 1989-1990 scholastic school year. Jewell continued as the Resource Teacher at Adamson until the beginning of the 1993-1994 school year when she was transferred to a self-contained classroom at Adamson. As the Resource Teacher Jewell's annual performance appraisal ratings were consistently high.

Shortly after Jewell was transferred to a self-contained classroom she reported to the school principal that she was not qualified to teach many of her students because of their varied and severe learning disabilities. Jewell also reported that she did

not have necessary instructional materials for her students. Thereafter, Jewell received a series of disciplinary actions leading up to her suspension and termination. At the time of her discharge by DISD, Jewell was employed on a three year contract which became effective on the first day of the 1994-95 scholastic school year.

On December 9, 1994 Jewell's Principal gave her written notice of his intention to recommend her termination to the DISD General Superintendent and of her right to appeal the recommendation. Jewell was immediately suspended from her teaching duties with pay. The basis for the recommendation was Jewell's inability or failure to perform assigned duties to the Principal's satisfaction. Jewell appealed the recommendation pursuant to the notice. Jewell received a hearing before a judicial council appointed under the authority of the DISD General Superintendent. The hearing was held on February 29, 1996 and continued on March 28, 1996. Jewell's appeal was based on her claim that she was not qualified to teach in a self-contained classroom, and that the Principal had not complied with the Texas Teacher Appraisal System in issuing her failing appraisals, and thus had denied her a fair notice of deficiencies and opportunity for remediation. At the time of the termination hearing, Jewell had a grievance appeal pending before the DISD Board of Trustees relating to the Principal's violations of regulations of the Texas Education Agency, and local policies and procedures.[1] At the hearing Jewell was represented by

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[1] On February 10, 1995, Jewell was forced to agree to suspension without pay, in order for DISD to agree to the continuance of the judical counsel hearing on the termination. (II Tr. 173) Jewell requested the continuance because she was expecting a decision from the Texas Education Agency on her appeal of DISD's denial of her Level III hearing on the appraisal grievance. Id. Since the appraisals were an integral part of the

counsel and attempted to prove that the recommendation was based upon inaccurate appraisals and the denial of a fair opportunity to correct any deficiencies in her performance. On May 31, 1996, the Judicial Council upheld the Principal's recommendation. The decision of the council stated -- "in our capacity as Hearing Officers, and in accordance with the authority granted to us by the General Superintendent, the Judicial Council hereby SUSTAINS the administration's recommendation to terminate this employee. It is therefore, ORDERED that Mary Jewell's employment be TERMINATED." This was the only notice of termination ever received by Jewell. Jewell was terminated as a result of the panel's order. None of the panel members were DISD board trustees.

Jewell filed suit under 42 U.S.C. §1983, alleging, *inter alia*, that DISD deprived her of her property interest in her continued employment in violation of the Due Process Clause of the 14th Amendment. Jewell alleged both procedural and substantive due process violations. Trial was held from September 28, 1998 through October 1, 1998. At the conclusion of Plaintiff's case in chief, DISD moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The Magistrate Judge sitting as the district court granted the motion and dismissed all of Jewell's Federal claims stating its reasons in open court. App. at 6a. The District Court held that the notice and hearing received by Jewell was sufficient to afford her due process of law. App. at 6a. The Court did not address the lack of post-termination process. Following a jury verdict for DISD on Jewell's breach of contract

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termination proceeding, Jewell was entitled to a final decision on the appraisal grievance before seeking to defend herself in the termination hearing.

claim, the Court entered judgment in favor of DISD. Jewell moved for a new trial or to amend the judgment pursuant to Rule 59. The motion was denied and appeal to the Fifth Circuit followed on October 26, 1998. On July 14, 1999 the Fifth Circuit affirmed the district court, concluding that no reasonable jury could have found in favor of Jewell on her Federal claims. App. at 3a.

RELEVANT PROVISIONS OF TEXAS EDUCATION CODE

In Texas, the employment of public school teachers is regulated by state law within the framework of the Texas Education Code ("Code"). Jewell's contract with DISD was authorized by §21.201(4) of the Code. By law Jewell could be terminated during the school year for "good cause" as determined by the DISD Board of Trustees. TEX. EDUC. CODE ANN. §21.211(a)(1)-(2) (Vernon 1996). Texas public school teachers are subject to annual performance appraisal pursuant to the Texas Teacher Appraisal System ("TTAS"). 19 TEX. ADMIN. CODE § 149.41 (West 1994) (Tex. Educ. Agency, Appraisal of Certified Personnel). The TTAS provided detailed procedures regarding classroom observations, appraisals, performance improvement plans and disciplinary measures, including termination.

If initiated before January 1, 1996, the termination of a public school teacher for inability or failure to perform assigned duties was governed by the January 1, 1995 version of the Code. TEX. EDUC. CODE ANN.§7.102 (historical note (Vernon 1998) [Act of May 30, 1995, 74th Leg., R. S., ch. 260,§64, 1995 Tex. Gen Laws 2500, 2501]. Pursuant to TEX. EDUC. CODE ANN. § 13.109(a) (Vernon Supp. 1995), a teacher could be terminated during the school year for "cause" as defined by the statute. Where the grounds for the proposed action relates to

the inability or failure of the teacher to perform assigned duties, that action was to be based upon the written recommendation by the superintendent of schools, filed with the board of trustees. TEX. EDUC. CODE ANN. §13.111(b) (Vernon 1991 & Supp. 1995).

The Education Code provided that no order adverse to the teacher shall be entered except on majority vote of the full board membership. *See* TEX. EDUC. CODE ANN. §13.114 (Vernon 1991). The school board trustees were required to give the teacher notice of the termination and reasons therefore. *Id.* The only appeals process available to a teacher terminated for cause during the school year was to appeal the action of the trustees to the Commissioner of Education. *Id.* at §13. 115 (Vernon 1991 & Supp. 1995). At no time did the DISD Board of Trustees notify Jewell that it had terminated her employment, or provide Jewell with notice of the reasons.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ENTERED A DECISION WHICH HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This Court should grant petitioner's request for writ of certiorari and remand to the Fifth Circuit with directions to reconsider its decision in light of this Court's decision in *Loudermill.*

A. A Public School Teacher Cannot Be Deprived of a Protected Property Interest Without Pre-Termination and Post-Termination Due Process.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that an individual may not be deprived of life, liberty or property without constitutionally adequate procedures. *Board of Regents v. Roth*, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2709 (1972), *Mathews v. Eldridge*, 424 U. S. 219, 334, 96 S.Ct. 893, 902 (1976). Public school teachers who enjoy a property interest in continued employment are entitled minimally to a pre-termination notice and hearing followed by a full post-termination opportunity to respond to the charges before the termination becomes final. *See Cleveland Bd. of Education v. Loudermill*, 470 U. S. 532, 538 (1985). Supreme Court precedent requires that the hearing must afford a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U. S. 371, 378, 91 S.Ct. 780, 786 (1971); *Armstrong v. Manzo*, 380 U. S. 545, 552, 85 S.Ct. 1187, 1197 (1971).

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property. *See Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990); *Landford v. Idaho*, 500 U.S. 110, 127, 111 S.Ct. 1723, 1733 (1991) (if notice and adversary process is not permitted there is an increased chance of error with the possibility of an incorrect result). In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976) this Court held that the risk of erroneous deprivation of a property interest was one of three paramount considerations in deciding what process was due under the Fourteenth Amendment. In *Loudermill*, this Court

stated -- "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the *decisionmaker* is likely to be before the termination takes effect." (citing *Goss v. Lopez*, 419 U.S., at 583-584, 95 S.Ct. 740-741; *Gagnon v. Scarpelli*, 411 U.S. 788, 784-786, 93 S.Ct. 1756, 1760-1761, 36 L.Ed.2d 656 (1973)).

B. Texas Law Creates Expectancy of Compliance By School District Which is Subject to Due Process Protection.

This Court has recognized that protected property interests are created by local rules, understandings and expectations. *Perry v. Sinderman*, 408 U. S. 564, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Expectations subject to due process protection can be created by state statutes. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 422 U. S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Burns v. U.S.*, 111 S.Ct. 2182, 2191-2192 (1991). Under Texas common law "laws which subsist at the time and place of the making of a contract ... enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Von Hoffman v. City of Quincy*, 71 U. S. (4Wall.) 535, 550, 18 L.Ed. 403 (1866); *Central Education Agency v. George West Independent School District*, 783 S. W. 200, 201 (Tex. 1989). Consequently, the provisions of the Texas Education Code were incorporated into Jewell's employment agreement with DISD and created an expectation they would be followed. Jewell enjoyed an expectation subject to due process protection that her contract of employment would continue until it expired or until such time as the DISD decisionmaker determined cause for her dismissal and afforded her notice and an opportunity to be heard before the termination took effect.

In the present case Jewell received no post-termination notice or opportunity to be heard by the statutory decisionmaker which was the DISD Board of Trustees. The third prong of the *Mathews v. Eldridge* balancing test calls for an inquiry into the probable value, if any, of additional or substitute procedural safeguards. *Id.* at 335, 96 S.Ct. at 903. As shown below, additional procedures through which Jewell might have addressed herself directly to the trustees as decisionmakers existed but were not complied with by DISD. If Jewell had received such an opportunity, she might have convinced the Trustees that the Principal's violation of the TTAS system had denied her an effective opportunity to remediate her alleged deficiencies, and that termination would be unjustified or even an erroneous deprivation of her job. Jewell might have convinced the Trustees that without the benefit of a second appraisal, from a neutral appraiser, she was denied a fair opportunity to demonstrate that her performance was satisfactory. *See fn. 2.* The evidence showed that Jewell had successfully performed her duties at Adamson for four scholastic years before she was transferred into a classroom that she was not trained to teach. Jewell might have convinced the Trustees that termination of her employment in the middle of a school year would work an extreme hardship on her ability to secure new employment. The Board might have allowed her to continue as a teacher under a performance improvement plan at least until the end of the school year. The trial evidence showed that as of the date of trial almost four years after her suspension, Jewell had not been able to secure new employment as a teacher.

As to additional procedural safeguards referenced in *Eldridge*, such were already in place under Texas law, but were not followed by DISD, despite Jewell's expectancy that they would be followed. Section §13.114 (Vernon 1994) of the

Education Code delegated final decision making authority to the DISD Board of Trustees. *See Carrillo v. Anthony Indep. School Dist.*, 921 S. W. 2d 800, 806 (Tex. App.-El Paso 1996, *n.w.h.*); *Salinas v. Central Educ. Agency*, 706 S.W.2d 791, 794-795 (Tex.App.-Austin 1986, *writ ref'd*). The Trustees were required to vote to approve the termination of Jewell's employment, and to provide her with notice of the reasons for her termination. Petitioner was entitled to such notice from the Board of Trustees prior to her termination becoming final. *See Bexar Cty. Sheriff's Civ. Serv. v. Davis*, 802 S. W. 2d 659, 662 (Tex. 1990), cert. denied 502 U. S. 811(1991); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417-418, 420 (Tex. 1993) (finding that teacher was entitled to notice from Board of Trustees of reasons for non-renewal as required by Education Code); *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). The failure of the DISD Board of Trustees to notify Jewell of her termination deprived her of right to appeal the final termination decision to the Commissioner of Education as provided for by §13.115 of the Code. *See subsection D below.*

C. Fifth Circuit's Application of Due Process Standards Conflicts with Supreme Court Precedent.

The Court of Appeals, after reviewing the record and the briefs, concluded that the district court did not err in granting DISD's motion for judgment as a matter of law. Jewell argued before the Fifth Circuit that the denial of a post-termination notice and hearing by the DISD Board of Trustees denied her due process of law. Therefore, in sustaining the district court dismissal of Jewell's Due Process Claim, the Fifth Circuit Court misapplied precedent as set forth herein.

D. The Fifth Circuit Sanctioned the Lower Court's Failure to Address the Petitioner's Claim of Denial of Post-Termination Due Process.

The district court dismissed Jewell's due process claim without addressing the issue of the denial of post-termination notice and hearing before the decision-maker. *Loudermill* required that the district court consider both pre-termination due process and post-termination due process issues before it could conclude that as a matter of law Jewell had been afforded due process within constitutional standards. Conceivably, the district court could have concluded that Jewell waived her right to post-termination due process by not requesting a hearing before the board of trustees after receiving notice of termination from the judicial council, but such a finding would not withstand constitutional scrutiny.

The evidence presented at trial showed that the presiding official at the judicial council hearing stated on the record on February 10, 1995, that Jewell could appeal it's decision to the board of trustees. (IV Tr. 803) The judicial council decision of May 31, 1996 did not state that Petitioner could appeal the decision to the board of trustees.[2] The school

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[2] Jewell's Third Level Appeal of the 1993-94 & 1994-95 appraisals was decided on September 29, 1995. App. 9a. The Hearing Officer ordered that an improper evaluation record conducted by the second appraiser in the 1994-95 school year be removed from Jewell's file. This action left Jewell without the benefit of a second appraisal which she was entitled to under TTAS. App. 12a. On April 25, 1996, the DISD Board of Trustees over-ruled the Level III Hearing Officer, but did not address the fact that Jewell had been denied a second appraisal both school years. The Board ordered partial relief, and clarified that the issue of Jewell's termination was not before it. App. 15a. (Jewell Trial Exh. 71). On April 17, 1996, the school administration

district had argued that Jewell waived her right to a post-termination notice and hearing before the board of trustees when she failed to request such a hearing following the judicial council decision to terminate her contract. Jewell maintained that irrespective of any action by her to appeal the judicial council decision, the DISD Board of Trustees was required by state law to make the final decision to terminate her employment and to notify her of its decision and reasons therefore. *See Brandy v. City Of Cedar Hill*, 884 S.W.2d 913, 916 (Tex.App.-Texarkana, 1994) (*appeal after remand*, 1996 WL 76325 (Tex.App.-Dallas 1996)(No. 05-95-00282-CV), *writ denied* (Sep. 4, 1997), *writ ref'd*, (Oct. 9, 1997) (*not designated for publication*)). Because the Board of Trustees failed to give Jewell notice and a hearing, she was, in effect, terminated in violation of state law. Without notice from the Board of its decision to terminate her contract, Jewell had no opportunity to appeal the termination to the Commissioner of Education. Jewell was thus denied her right to the appeals process made available by state law which alone violated her right to due process of law. *See Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). The Court of Appeals sanctioned the lower court's departure from controlling decisions of this Court which calls for this Court to exercise its supervisory power to correct.

CONCLUSION

Based upon the authorities cited and the arguments presented, the Court should grant the petition for writ of certiorari. The issues presented here were addressed by this

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moved the Judicial Council to abate its deliberations in light of the Board's decision, and to reopen the record before final determination. (R.E. 19). The council never did so.

Court in *Loudermill.* Petitioner requests that this Court summarily reverse and vacate the judgment of the Fifth Circuit and remand for reconsideration in light of this Court's decision in *Loudermill* relating to post-termination due process.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JULY 14, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11265
Summary Calendar

MARY JEWELL,

Plaintiff-Appellant/Cross-Appellee,

versus

DALLAS INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee/Cross-Appellant

Appeal from the United States District Court
For the Northern District of Texas
(3:96-CV-3287-AH)

Before DAVIS, DUHE, and PARKER, Circuit Judges. PER CURIAM*:

Plaintiff-Appellant Mary Jewell sued the Dallas Independent School District ("DISD") pursuant to 42 U.S.C. § 1983, alleging that she had been terminated because of protected speech activity under the First Amendment. Jewell further alleged that DISD denied her procedural and substantive due process in violation of the Fourteenth Amendment, and that DISD breached her three-year employment agreement in the manner in which it terminated her. The matter was tried to a jury beginning in September 1998. At the conclusion of Jewell's case in chief, DISD moved for a dismissal of all of Jewell's claims pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The Magistrate Judge, sitting as the district court, granted the motion as to all of Jewell's federal claims, but denied it as to her breach of employment agreement claim. The jury returned a verdict for DISD on the breach of employment agreement claim. Jewell filed a Rule 59 motion to amend judgment or for a new trial, which the district court denied. This appeal followed.

A trial court's decision to grant a motion for judgment as a matter of law is reviewed de novo, applying the same legal standard that the district court used. Ikerd v. Blair, 101 F.3d 430, 432 (5th Cir. 1996). Judgment as a matter of law is proper if a party has been fully heard by a jury on a given issue, and "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." Fed. R. Civ. P. 50(a). In making this determination, the evidence is to be viewed in the light most favorable to the non-movant, and any reasonable inferences are to be drawn in her favor. Ikerd, 101 F.3d at 432. The denial of the Rule 59 motion to alter or amend judgment is reviewed for abuse of discretion. St. Paul Mercury Ins. Co. v. Fair Grounds Corp.,

123 F.3d 336, 339 (5th Cir. 1997). Such an abuse of discretion has occurred only if, viewing the evidence in the light most favorable to the verdict, the evidence points so strongly and overwhelmingly in favor of one party that the court believes "that reasonable men could not arrive at the contrary" conclusion. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

Following a review of the record and the briefs, we conclude that the district court did not err in granting DISD's motion for judgment as a matter of law. No reasonable jury could have found in favor of Jewell on her federal claims. Likewise, we find that the district court did not abuse its discretion in denying Jewell's motion to amend judgment or for a new trial. The evidence was adequate for a reasonable jury to find in favor of DISD.

AFFIRMED.

APPENDIX B - OPINION OF THE UNITED STATES MAGISTRATE SITTING AS THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS RENDERED FROM THE BENCH ON OCTOBER 1, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY JEWELL	§	NO. 3:96-CV-3287-AH
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
DALLAS INDEPENDENT	§	
SCHOOL DISTRICT	§	
	§	Dallas, Texas
Defendant.	§	October 1, 1998

P-R-O-C-E-E-D-I-N-G-S

(Jury not present for the following:)

THE COURT: Let the record reflect that these proceedings are outside the presence of the jury. The record also reflects that at the conclusion of plaintiff's case in chief the defendant has moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. At this time I will read into the record my rulings concerning the defendant's motion.

At the conclusion of the plaintiff's case in chief, defendant moved for judgment as a matter of law pursuant to the provisions of Rule 50(a) of the Federal Rules of Civil Procedure, having considered to evidence presented by plaintiff and the arguments of counsel with respect to defendant's motion, the Court finds and orders as follows:

A motion made under Rule 50(a) is meritorious only if after the plaintiff's case has been fully presented and the plaintiff has rested, the Court finds that there is no legally sufficient evidentiary basis from which a reasonable jury could find in the plaintiff's favor. Defendant argues that it is entitled to judgment as a matter of law on each of plaintiff's constitutional theories of liability, as well as on plaintiff's breach of contract claim under this Court's supplemental jurisdiction. In response to defendant's motion, plaintiff states that she is not pursuing any claim predicated either on an invasion of privacy or on a claim of denial of equal protection. Therefore, to the extent that such claims may be considered as having been asserted by plaintiff, defendant's motion pursuant to Rule 50(a) should be granted.

The parties drawing issue on the remaining constitutional violations asserted by plaintiff, as well as on her breach of contract claim, which the Court now considers seriatim. First of all, procedure due process. Plaintiff's claims in this area arise out of the defendant's termination of her contract of employment, which the parties concede vested plaintiff with a constitutionally protected property interest in continued employment as teacher. With respect to the procedural due process to which plaintiff was entitled, the constitution imposes on her employer the obligation of providing fair notice of the basis for the contemplated employment action and of providing plaintiff with an opportunity to be heard before an impartial decision maker. Citing Cleveland Board of Education v. Loudermill, 470 U.S. 532 at 538 through 539, a 1985 Supreme Court decision. The

evidence presented by plaintiff establishes that she received notice of the defendant's intent to terminate her contract of employment. Specifically see Plaintiff's Exhibit 66. The notice letter specifically identified alleged violations of the defendant's written policies and referred plaintiff to the fact of her two most recent appraisals which were unsatisfactory. The evidence is uncontroverted that plaintiff was apprised of the unfavorable findings in the appraisals at or about the time they were made. The evidence is also uncontroverted that she initiated grievances with regard to the appraisals prior to the date she was notified of defendant's intent to terminate her.

The constitutional procedure due process is limited to the sufficiency of the notice, which may be general or specific, oral or in writing, so long as the notice provides sufficient detail of the charges so that the employee can show any error. In a Section 1983 action only the constitutional issues can be considered. Neither a showing that an agency's policies may not have been complied with, not that other errors on the part of the supervisory personnel occurred can establish a cognizable constitutional violation. It is also uncontroverted that plaintiff was granted a hearing to present her testimony and that of others on her behalf, and to cross examine witnesses presented by defendant. Based upon the evidence presented, no reasonable jury could find that defendant violated plaintiff's right to procedural due process.

The second issue, substantive due process, plaintiff's evidence with respect to her claim that her substantive rights to due process were violated is insufficient to permit a reasonable jury to find in her favor. Substantive due process is satisfied so long as the affected public employee is granted a meaningful opportunity to be heard and a hearing before an impartial tribunal and so long as the employment decision breached was not arbitrary and capricious. The evidence presented is uncontroverted that the council which held a hearing with

respect to plaintiff's termination was fairly and impartially selected. That plaintiff was advised of the names of those persons who would be called to testify in favor of the recommendation to terminate her contract of employment, that she was represented by any attorney at the hearings, that she was afforded the opportunity to testify, call witnesses and cross examine witnesses. Further, the evidence presented in plaintiff's case in chief establishes that the evidence presented to the counsel at the termination hearing was sufficient character and substance to preclude the possibility that a reasonable jury could not find that the decision to terminate plaintiff's employment was arbitrary and capricious.

The next issue is the plaintiff's first amendment claim. In the context of public employment, a public employee's first amendment projections are limited. A public employee's speech is protected by the first amendment only is such speech is of public concern and the employee's interest in speaking freely outweighs the employer's interest in maintaining efficiency. Citing Connick v. Myers, 461 U.S. 138, 103 Supreme Court Reporter, 1684, a 1983 decision.

Under the public concern test, both the content of the speech and the context in which it was uttered and formed the issue and involved the following factors: The degree to which the employee's protected activity involved a matter of public concern and the gravity of that concern, whether close working relations are essential to fulfilling the responsibilities of the public office, and the extent to which the employee's protected activities may have affected those relationships. Three, the time, place and manner of the employee's activities, and four, the context in which the employee's activities were carried out. Issues do not arise to a level of public concern by virtue of the speaker's interest in the subject matter, rather they achieve that protected status if the words or conduct are conveyed by the teacher in his role as a citizen and not in his roll as an employee

of the school district. Citing Kirkland vs. Northside Independent School District, 890 F.2d 794, 789-99, a Fifth Circuit decision handed down in 1989 and in which the Supreme Court denied cert.

Plaintiff's evidence shows that on several occasions she complained to persons responsible for supplies and books; that she did not have books required for her students. On another occasion she suggested that students were not appropriately assigned to her self-contained classes. The evidence shows that plaintiff's request to re-evaluate students was never responded to. Her request for more books met with mixed results. Each of the persons to whom she communicated her concerns were persons who were responsible for supplies. On one occasion plaintiff suggested in a letter that the delay in providing books to her students was racially motivated. However, she failed to present any competent evidence to support this subjective impression. The request for supplies was consistent only with plaintiff's role as a teacher employed by defendant. This is buttressed further by the fact that the contents of her communications were communicated no further than to the supply personnel.

Further, in order to prevail on plaintiff's first amendment claim, plaintiff must prove that the speech in which she engaged was a substantial and motivating factor in defendant's decision to terminate her employment. There is no evidence that the above referenced communications had any effect on the decision which was made. Therefore, no reasonable jury could find in plaintiff's favor on her first amendment claim. And the defendant's motion on plaintiff's first amendment claim will be granted.

The final theory of recovery is under Texas state breach of contract law, which is before the Court, and the Court's supplemental jurisdiction. In this there has been evidence presented in the plaintiff's case in chief which suggests that there

was cause for the termination of the plaintiff. However, the plaintiff has also presented evidence, which if accepted and believed by the jury, would support a conclusion that there was not good cause for her termination, and therefore with respect to the plaintiff's breach of contract claim, the defendant's motion should be denied, and it is therefore ordered that the defendant's motion is granted in all respects except for the plaintiff's breach of contract case on which the Court will deny the defendant's motion under Rule 50(a).

And that will be the ruling of the Court.

APPENDIX C - DECISION OF DISD
LEVEL III ADMINISTRATIVE HEARING PANEL
DATED September 25, 1995

IN THE MATTER OF THE GRIEVANCE OF	}	**NO. A3091195-948-3**
MARY JEWELL	}	

DECISION

Mary Jewell, brings this grievance before a Dallas Independent School District Hearing Officer appointed by the General Superintendent. The hearing was held on September 11, 1995 in the Personnel Center Hearing Room. Ms. Jewell was represented by Mr. Kenneth Byford, attorney. The Administration was represented by Mr. William Morgan.

FINDINGS OF FACT

After due consideration of the evidence and matters produced, I in my official capacity as hearing officer, make the following Findings of Fact:

1. Employee is assigned as Special Education teacher at Adamson High School.

2. In 1993-94 employee was informed that she would be observed by the principal for appraisal purposes. The window was specified as within three weeks of October 26, 1993.

3. The principal was unable the meet the three week window, and the employee was formally observed on November 19, 1993. The observation began at 8:35 and concluded at 9:20.

4. Attached to the observation record was a note stating that additional visits would be conducted. The Observation Record was reviewed with the employee on December 7, 1993.

5. A follow-up visit occurred on January 26, 1994. Through a memo the principal enumerated specific areas where the teacher could improve. No additional points were added to the OR originally completed on November 19, 1993.

6. On February 1, 1994, the employee wrote the principal stating that she thought it was unfair for him to "continually observe my classes and continually give me notices that you will come to observe."

7. On April 19, 1994, the principal communicated with the employee via a memo attempting to clarify that her evaluation was not over until the Observation Record was changed to an Evaluation Record. He indicated that at that time her overall rating was "Below Expectations."

8. The Appraisal Record for 1993-94 was completed and reviewed with the employee May

4, 1994. The overall rating as calculated by the principal was "Unsatisfactory". An error was made as the AR was completed. Additional points was added to the OR/ER and were not transferred to the AR.

9. On May 20, 1994, a Professional Growth Plan was created.

10. On September 16, 1994 an observation was completed. The principal observed the employee from 8:35 - 9:20. The OR was reviewed with the employee on September 22, 1994 stating that a follow-up observation would be held. The pre-observation conference was changed to October 4, 1994. The observation was scheduled for October 6, 1994.

11. A second appraiser observed the employee on October 20, 1994. The Evaluation Record was completed on the same date, and a conference was held with the second appraiser on October 26, 1994.

12. A Professional Growth Plan was completed on November 1, 1994.

13. An Appraisal Record was completed on December 8, 1994. The rating was reflected as "Unsatisfactory". There was a numerical error made on the AR.

DISCUSSION

The employee believes that errors were made by the administration regarding her evaluations for both the 1993-94 and 1994-95 school years. Indeed, errors were made. These include: math errors in transferring data from the OR/ER to the AR; incorrectly summarizing the overall rating; and observing the employee on a date specifically noted as a date excluded from TTAS. The sum of these administrative errors, however, does not make a significant change in the overall summative rating of the employee for 1993-94 and 1994-95.

The principal recognized that the employee had serious and continuing problems with instructional delivery. He specified areas where improvement was needed, conducted additional observations, observed for the required 45 minutes of uninterrupted instruction, sought assistance from other educators, assisted with the completion of PGP's for two years, conferred with the employee, and informed the employee of the situation through numerous memos. The belief held by the employee that the evaluations were unfair was not proven. The errors made by the administration are unfortunate and should not be overlooked. However, the mathematical errors do not tip the scale to such a degree to find the employee innocent of ineffective teaching.

JUDGMENT

Based upon the above finding of facts and conclusion of law, and policy reached above, it is **ORDERED** that:

1. The Appraisal Record be corrected with the appropriate data for 1993-94.

2. The Evaluation Record conducted by the second appraiser on October 20, 1994 be removed from the file.

3. The Appraisal Record for 1994-95 be recalculated.

4. A conference be held with the Employee to complete the new Appraisal Records for 1993-94 and 1994-95.

It is further **ORDERED** that all other aspects of the grievance be **DENIED**.

SIGNED and ENTERED the 29th day of September, 1995.

Signed Linda Johnson
Linda Johnson, Level III Hearing Officer

APPENDIX D - DECISION OF DISD BOARD OF TRUSTEES OVERRULING THE LEVEL III HEARINGOFFICER DECISION RELATIVE TO JEWELL'S APPEAL OF PERFORMANCE APPRAISALS - DATED April 25, 1996

FOR USE BY BOARD SECRETARY
APPROVED_____ FILED_____
AMENDED_____ (SEE MINUTES)
BOARD FILE NO. _____

(Icon Omitted)

3700 Ross Ave., Dallas, TX 75204
BOARD OF EDUCATION AGENDA ITEM

13.2
(AGENDA ITEM NUMBER)

April 25, 1996
(DATE OF BOARD MEETING)

TITLE OF DOCUMENT: ADOPTION OF FINDINGS IN LEVEL IV GRIEVANCE APPEAL FOR MARY JEWELL

On April 11, 1996 the Board of Education held a hearing for the purpose of affording an appeal for Mary Jewell concerning teaching appraisals.

The hearing before the Board of Education included a tape of the Level III Hearing and the oral arguments of the parties. After review of the evidence and consideration of issues in the hearing, the Board of Education hereby adopts the attached decision.

DALLAS INDEPENDENT SCHOOL DISTRICT
BOARD OF TRUSTEES

IN THE MATTER OF THE }
GRIEVANCE OF }
MARY JEWELL, }
GRIEVANT. }

Before the Board Members Hollis Brashear, Board Vice-President; Bill Keever; Lynda McDow, Kathleen Leos, and Lois Parrott.

Board member Bill Keever delivers the majority opinion for the Board of Trustees.

DECISION

Based upon the evidence before the Board of Trustees from the administrative hearing, as well as oral argument before the Board of Trustees, the only issue before the trustees is whether or not the grievant was entitled to a below expectations rating instead of an unsatisfactory appraisal in grievant's final appraisal with the district prior to her termination. Based upon the evidence and argument, the Board overrules the Level III Decision with respect to grievant's appraisal, and orders that the appraisal record be altered to reflect a "Below Expectation" rating.

There was no evidence before the Board of Trustees respecting grievant's termination. The Board specifically denies any and all relief with respect to grievant's termination.